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DAILY NEWS

News Analysis

The Emerging Debate Over New TSCA Rules: 'Achievable' v. 'Lawful'

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The Trump administration's recently unveiled framework rules for implementing key provisions of the new Toxic Substances Control Act (TSCA) are sparking a debate that suggests different visions for how the law should be implemented in the future with EPA officials saying the rules were crafted to be “achievable,” while agency critics charge they still need to be lawful.

The debate emerged June 27 during an Environmental Law Institute (ELI) conference celebrating the reform law's first anniversary at George Washington University, where top EPA officials sought to defend the recently issued framework rules.

“It's really nice to have pie-in-the-sky ideals, but if you can't figure out a way to implement them, that's not prioritizing health,” Nancy Beck, the top political appointee in EPA's toxic office, told the conference.

“If you want to look at a ginormous universe of things such that you can't complete anything in a timely manner, that is not prioritizing health. So I think you'll see in the three rules that we have prioritized health by making these rules workable, practical, achievable and implementable,” she added.

By contrast, Democrats and environmentalists charged that the framework rules -- especially a measure detailing how the agency planned to conduct risk evaluations -- may not be lawful as EPA narrowed the range of uses that must be considered in any assessment.

“Contrary to the clear intent of the law, these final rules allow EPA to focus only on a subset of uses rather than conducting comprehensive reviews. Broad use exclusions can be set up front and the EPA is given authority to exclude yet more uses of a chemical on a case by case basis,” Sen. Tom Udall (D-NM), one of the law's lead

sponsors, told the conference.

He said that while the approach may ease EPA oversight of industry, he warned that a narrow focus on chemical uses could undermine efforts to ensure adequate federal protections, and revive state efforts to regulate chemicals -- an action that industry sought to avoid.

But Beck argued that the law provides the agency with "appropriate discretion" to appropriately narrow the rule's focus. "We don't take this discretion lightly, but we will use this discretion to make sure that we appropriately prioritize. There are many opportunities for the public to engage with us to tell us when they think our priorities are off and to help get us back on track so we think this is workable," she said.

Wendy Cleland-Hamnett, the acting EPA toxics chief and a top career official, said the framework rules and EPA's implementation will determine how well the law works. "In the end, implementation is going to tell us how the law works. At EPA we feel as if it's a great opportunity and a great responsibility," she said.

Different Visions

Such different visions suggest the debate over the law is likely to continue as EPA works to implement the new law -- and defends the rules against any lawsuits, with courts left to decide how much discretion EPA may have to depart from congressional intent.

EPA issued the three framework rules June 22, complying with deadlines in the law to issue the rules within one year of enactment.

In addition to the risk evaluation rule, the framework rules include the TSCA inventory reset to determine the universe of existing chemicals that will be subject to the new law's requirements and a prioritization rule describing how EPA will determine which of the thousands of existing chemicals will undergo risk evaluations and when.

The three framework rules were all required by the TSCA reform law, which directed EPA to finalize them to establish a process for prioritizing and assessing "existing" chemicals.

Those are chemicals that had been on the market when the original TSCA was enacted in 1976 and which were largely grandfathered from review by the original law, which was widely criticized for failing to allow EPA to regulate them.

But Udall and others charged that the rules could undermine his efforts to ensure the new law does not result in the same deficiencies as the old law.

"I will fight tooth and nail to protect the [TSCA reform act] from going the way of the original TSCA," Udall said.

"We do not want to go back to a lack of confidence in our federal program with the burden falling on states to regulate chemicals of concern and with consumers unsure whether the products they purchase are safe. But that is a real risk. Industry in particular must avoid the temptation to overstep just because of a new favorable political climate." Udall added that he has concerns about the final rules creating the new program for reviewing existing chemicals, and pointed in particular to the final risk evaluation rule's allowance for dropping some chemical uses from EPA's reviews.

"My initial review of the final rules makes me concerned that this EPA will try to use the program to prioritize safeguarding industry, rather than the public. For example, EPA should not open the door to conducting very narrow assessments of chemicals, some at industry's behest, when Congress intended that EPA do broad assessments."

Udall argued that in the original TSCA, "Congress envisioned that TSCA would take into account and control chemical exposures across the full cycle of chemicals and across different spaces and different uses. That promise was never realized and one of the reasons I worked so hard to reform the law."

He said he had "high hopes" the new law would result in such oversight, especially given the Obama administration's proposals. But he said he is "disappointed to see the final rules not only significantly weaken those proposals, but seek to return us to the old days and old ways of piecemeal chemical evaluation that don't reflect anything we know

about the real world.”

But Cleland-Hamnett sought to downplay concerns over the scope of use evaluations, saying EPA is trying to balance concerns that it will evaluate every use scenario, no matter how unlikely, with concerns that it will ignore widespread, important uses.

“The reality is to meet the deadlines the way the law anticipates, we need to be pragmatic about how we define uses,” she said. One way to do that will be to group together similar uses for risk evaluation, and she indicated that these could be completed at different time points within the statutory window.

“We do know, however, that we +have to follow the requirement [to evaluate risk] for every use,” she said. “This is an area where it’s most important to understand that we’re going to figure out how to do this as we actually start evaluating chemicals on the ground.”

Next Deadlines

Others voiced similar concerns. “I think in fact the jury is out on whether we are heading for success under this program or whether this program will disappoint the expectations of Congress and the public,” said Bob Sussman, a former EPA deputy administrator in the Clinton administration who is now advising environmentalists.

He questioned whether EPA will be able to meet the next set of deadlines in the new law, which requires EPA to complete the first 10 risk evaluations to existing chemicals within three years; select the first set of high priority chemicals for review and identify 20 low priority chemicals which will not undergo review.

“I am concerned that the risk evaluations will not be completed on time. EPA is now working on a problem formulation process which will extend for at least the next six months. This is a process that is not well-defined and will necessarily delay work on the risk evaluations themselves. I’m also concerned we don’t have confidence that those initial risk evaluations will address the full suite of uses on the first 10 chemicals identified in the scoping documents.”

Sussman also flagged other issues of concern. He pointed to one of the major changes between the draft and final versions of the chemical prioritization rule: EPA’s decision to drop a pre-prioritization step to gather more stakeholder input in meetings this fall. The step was proposed to allow EPA to gather and if necessary, order new testing on chemicals before entering the official prioritization process, which has tight statutory deadlines.

“We also have 20 chemicals that have to be designated high priority within two-and-a-half years. That means that the agency needs to begin the prioritization process and review on candidates for those listings,” Sussman said. “The big question that I have and a lot of others in the NGO community have is whether we’ll have a robust information base on those prioritization candidates? In other words, whether the agency will move ahead to require testing to fill data gaps, to develop exposure information and put in place the foundation that it will need for good risk evaluations on these next 20 chemicals.”

Related to those concerns, Sussman questioned EPA’s “decision to kick the can down the road on the pre-prioritization process. Because I think what that comes close to saying is there won’t really be use of EPA’s new information collection authority to fill data gaps and develop the robust information base we’ll need for those next 20 evaluations.”

But Cleland-Hamnett said that after much discussion, she and colleagues decided not to move forward with the pre-prioritization step proposed in the draft rule because of the multitude of questions about it. “We are planning major efforts this fall to have those discussions,” she promised, adding that there is time to do so because the first 10 existing chemical evaluations are underway “and we have some time before we finish and have to start on the next.”

Former career EPA toxics chief Charles Auer, now with the law firm Bergeson & Campbell, echoed Sussman’s concern when he noted his own disappointment that EPA has yet to exercise its new TSCA authorities in section 4 to order toxicity tests of existing chemicals.

“To me, the central failing of the [original] law was in section 4,” which didn’t give EPA the authority to generate the information needed to conduct risk assessments, Auer said. “I’m very pleased that new TSCA made important changes to section 4 to issue orders. I think is remarkable.”

But he described his regret that in the year since the TSCA reform law's passage EPA has not issued any section 4 testing orders, because "like it or not, testing takes time. In EPA's defense, they were busy with a few other things. I am hopeful that in the not too distant future, we'll see that first action under section 4 and with increasing regulatory [action] thereafter." -- *Maria Hegstad* (mhegstad@iwpnews.com)